
**Noteworthy:**
Senator John Cornyn; Senate Sense & Nonsense; SCOTUS rules of order. July 05, 2005; *National Review*,

"This ought to be a set of hearings treating people with respect. They ought to be fair. They ought to be comprehensive, ask any questions you want within reason, and we ought to go through a process that is dignified and respectful, but unfortunately that hasn't been the case in a number of instances with Republican nominees in the past I don't think we've ever had this problem with Democrat nominees."
**-Senator Orrin Hatch, ABC, Good Morning America, 7/05/05**

**Excerpts from past Supreme Court nomination hearings….**
Ginsburg: "I sense that I am in the position of a skier at the top of the hill, because you are asking me how I would have voted in *Rust v. Sullivan* (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope because once you ask me about this case, then you will ask me about another case that is over and done, and another case. So I believe I must draw the line at the cases I have decided."

*The Supreme Court of the United States Nominations, 1916-1993, Ruth Bader Ginsburg,* vol. 18, p. 288.

Ginsburg goes on to note how her position as a judge would be "compromised" if she told "this legislative chamber" how she would rule in a case that could come before her, and that the prospect of doing so caused her "extreme discomfort." *Id.* at 288.

**Senate Sense & Nonsense; SCOTUS rules of order.**
**July 05, 2005**
**National review**

**By Senator John Cornyn**

The retirement announcement of Justice Sandra Day O'Connor on Friday has understandably provoked substantial discussion about the process for selecting her successor.

Three general principles should apply to the Senate's consideration of any judicial nominee: The Senate should focus its attention on judicial qualifications, not personal political beliefs; the Senate should engage in respectful and honest inquiry, not partisan personal attacks; and the Senate should apply the same fair process — confirmation or rejection by majority vote — that

has existed for 214 years of our nation's history. [See http://www.nationalreview.com/comment/cornyn200506270825.asp for more.]

In addition, the retirement of Justice O'Connor has triggered additional arguments that demand a response from those who care about preserving and maintaining the proper limited role of the courts in our constitutional democracy.

THE LAW'S THE THING

First, some have argued that President Bush must nominate a politically moderate justice to succeed Justice O'Connor — in order to preserve the Court's current ideological balance. These arguments ignore the fact that judges are supposed to follow the law — not their own personal political beliefs.

Moreover, President Clinton followed no such command when he filled his first Supreme Court vacancy. When Justice Byron White — who authored judicially restrained decisions such as *Bowers v. Hardwick* and one of only two dissents in *Roe v. Wade* — retired in 1993, President Clinton nominated Ruth Bader Ginsburg to succeed him. Ginsburg, a brilliant jurist, had served as general counsel of the American Civil Liberties Union — a liberal organization that has championed the abolition of traditional marriage laws and attacked the Pledge of Allegiance. She had previously written that traditional marriage laws are unconstitutional; that the Constitution guarantees a right to prostitution; that the Boy Scouts, Girl Scouts, Mother's Day, and Father's Day are all discriminatory institutions; that courts should force taxpayers to pay for abortions, against their will; and that the age of consent for sexual activity should be lowered to age 12.

The Senate nevertheless confirmed her by a 96-3 vote. And just two years ago, she joined the Court's five-vote majority to overrule *Bowers* — setting off a nationwide campaign to abolish traditional marriage laws across the country.

If new justices are supposed to be selected to preserve the preexisting ideological balance of the courts, President Clinton didn't appear to get the memo.

We should also recall the full extent of Justice O'Connor's record — and thus what is truly at stake in this debate. Without Justice O'Connor:

- The Boy Scouts would have been stripped of their First Amendment freedom of association (*Boy Scouts of America v. Dale*).
- Common-sense criminal laws like three-strikes-and-you're-out would have been invalidated by the courts (see, e.g., *Ewing v. California*; *Lockyer v. Andrade*).
- Inner-city schoolchildren would have been deprived of access to school choice programs (*Zelman v. Simmons-Harris*).
- Terrorists like Yaser Hamdi would have been released onto American streets, instead of detained as enemy combatants (*Hamdi v. Rumsfeld*).
- In case after case, states would have been deprived of their sovereign ability to govern themselves (see, e.g., *United States v. Lopez*; *United States v. Morrison*; *Printz v. United States*; *Seminole Tribe of Florida v. Florida*; *Alden v. Maine*; *Board of Trustees of Univ. of Ala. v. Garrett*; *Kimel v. Florida Bd. of Regents*), while various expressions of faith would have been barred from the public square (see, e.g., *Rosenberger v. Rector and Visitors of Univ. of Va.*; *Agostini v. Felton*; *Lynch v. Donnelly*).

Each of these important 5-4 rulings would have been decided differently without Justice O'Connor on the Court — and each of these important 5-4 rulings could be at risk, if the president's opponents have their way in determining the next nominee.

What's more, just last month, Justice O'Connor was the leading voice on behalf of the rights of homeowners, small businesses, and other private property owners against the abusive exercise

of government power, through her dissent against the Court's 5-4 ruling in *Kelo v. City of New London*, which has provoked a national uproar over the last two weeks. And just last year, Justice O'Connor provided a critical voice in defense of the voluntary recitation of the Pledge of Allegiance in public schools, even though a majority of her colleagues refused to do so.

So even if the Senate were to abandon presidential prerogative and judicial independence in an effort to maintain the current ideological balance of the Court (assuming that it is even possible to do so), Justice O'Connor's successor would be expected to commit to judicially restrained positions on a whole range of issues.

Then there is *Roe v. Wade*. But *Roe* was decided over 30 years ago — in 1973 — and the current balance on the Court is 6-3 in favor of *Roe*. The real issue today is whether the federal courts will allow the American people to govern themselves, by enacting overwhelmingly popular, common sense laws like parental notification and parental consent requirements for minors seeking an abortion, and restrictions on partial-birth abortion, and by protecting taxpayers from forced federal funding of abortions.

THE CONSULTATION MYTH

Second, some have argued that the president is required to consult with individual senators before nominating Justice O'Connor's successor. But let's be clear: There is no such requirement under either the Constitution or Senate tradition. The Constitution provides for the advice and consent of the *Senate*, not individual senators — and only with respect to the *appointment*, not the nomination, of any federal judge.

The reason is simple: The Founders believed that the president — not the Senate — should control the nomination of judges, including Supreme Court justices. As Alexander Hamilton noted in Federalist No. 66, "[i]t will be the office of the president to *nominate*, and with the advice and consent of the senate to *appoint*. There will of course be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive . . . but they cannot themselves *choose* — they can only ratify or reject the choice, of the president." Hamilton explained why this was important in Federalist No. 76, where he wrote that "one man of discernment is better fitted to analyze and estimate the peculiar qualities adopted to particular offices than a body of men . . . . A single well directed man by a single understanding, cannot be distracted and warped by that diversity of views, feelings and interests, which frequently distract and warp the resolutions of a collective body." Thus, as renowned constitutional scholar and historian David Currie has pointed out, President George Washington consulted with the Senate on the negotiation of future treaties, yet "no comparable practice emerged with regard to appointments; from the outset the President simply submitted the names and the Senate voted yes or no. . . . Madison, Jefferson, and Jay all advised Washington not to consult the Senate before making nominations."

Likewise, early Senate practice suggests that the Senate's "Advice and Consent" function is simply to decide whether or not to "consent" to a presidential nomination, and separately to "advise" whether the president should in fact appoint the individual whom the Senate has confirmed. (When the Senate exercised its "Advice and Consent" function for the first time in our nation's history with respect to a treaty, the Senate expressly resolved "[t]hat the Senate do consent to the said convention, and advise the President of the United States to ratify the same.")

Of course, the president has the right to consult anyone he so chooses, and indeed, President Bush has already begun to consult with individual senators at his own discretion — and to his credit. But courtesy is a two-way street — if senators want to consult, they should first commit to the three principles articulated above. Moreover, consultation is not co-nomination. In 1993, President Clinton consulted with the then-chairman of the Senate Judiciary Committee, Senator Orrin Hatch, over the temperament and qualifications — not the political views or ideology — of potential Supreme Court nominees. When President Clinton subsequently nominated Ruth Bader

Ginsburg, it was certainly not because Chairman Hatch agreed with her opposition to traditional marriage laws or her views on forced taxpayer funding of abortion.

TESTING TIMES

Once President Bush announces his nominee, a campaign of character assassination could quickly ensue. In addition, many Senate observers expect that the president's opponents will insist on violating Senate tradition and judicial ethics requirements, by demanding that the nominee satisfy a variety of litmus tests and explain how he or she would rule in a variety of hypothetical cases.

Yet it was not long ago that senators agreed that litmus tests and forced promises to politicians present serious dangers to judicial independence and the rule of law. The Senate overwhelmingly confirmed President Clinton's nominees to the Supreme Court, Ruth Bader Ginsburg and Stephen Breyer, after they repeatedly upheld judicial tradition and ethics by refusing to answer questions about how they would rule in specific cases. Indeed, as Justice Ginsburg herself noted just a few years ago, "in accord with a longstanding norm, every Member of this Court declined to furnish such information to the Senate . . . . [T]he line each of us drew in response to preconfirmation questioning . . . is crucial to the health of the Federal Judiciary. . . . When a [nominee] promises to rule a certain way on an issue that may later reach the courts, the potential for due process violations is grave and manifest."

The process for selecting the next associate or chief justice should reflect the best of the American judiciary — not the worst of American politics. America deserves a Supreme Court nominee who reveres the law — not one who is required to make promises to politicians as a condition of serving on the federal bench. And we deserve a confirmation process that is civil, respectful, and keeps politics out of the judiciary. Anything else would greatly dishonor the tenure and service of our nation's first female Supreme Court justice, as well as our nation's founding commitment to the rule of law.

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